

Rep. Lofgren Calls for Investigation into Defense Department's Surveillance of U.S. Citizens

Requests Report on DOD Monitoring Activities in 30 Days from Inspector General

Washington, DC – Rep. Zoe Lofgren (D-San Jose) today sent a letter to the Inspector General of the Department of Defense (DOD) calling for an immediate investigation into the recent allegations that the DOD developed and maintains a database of information on United States persons. Earlier this month, NBC News reported that over a 10-month period more than 1,500 "suspicious incidents" across the country were monitored and recorded in a DOD database, including a protest against military recruiters at UC-Santa Cruz in April. Below is the text of Rep. Lofgren's letter:

December 30, 2005

Mr. Thomas F. Gimble

Acting Inspector General

U.S. Department of Defense

c/o Office of Communications and Congressional Liaison

400 Army Navy Drive

Arlington, VA 22202-4704

Dear Mr. Gimble:

I write to ask that you begin an immediate investigation of recent allegations that the Department of Defense (DOD) has developed and maintains a database of information on United States persons, apparently collected in violation of DOD regulations and the Foreign Intelligence Surveillance Act (FISA).

According to news reports, DOD has developed one or more databases of information on domestic persons, including "the monitoring of peaceful anti-war and counter-military recruitment groups."^[i] According to this report, the DOD's information collection consists of "domestic intelligence that goes beyond legitimate concerns about terrorism or protecting U.S. military installations."^[ii] Furthermore, it is reported that such information is retained in DOD's databases even after it has been deemed irrelevant to combating terrorism or protecting military facilities.^[iii] The report indicates that DOD's purpose in collecting and retaining this information is in part to further a data mining project conducted by DOD's Counterintelligence Field Activity (CIFA) agency, based at least in part on Threat and Local Observation Notice (TALON) reports.^[iv]

I am concerned that the information collected and retained by DOD may have been collected in violation of its own regulations and in violation of FISA. The reports do not indicate that the information DOD has collected on U.S. persons has been obtained pursuant to a court order or that it is publicly available information. If true, these activities could violate FISA's general stipulation that searches of U.S. persons, whether electronic or physical, be performed pursuant to a court-ordered warrant upon a determination of probable cause.^[v] This could also violate FISA's stipulation that DOD's surveillance and search activities collect foreign intelligence information, rather than target domestic speech activities protected by the First Amendment. FISA's provisions authorize surveillance and searches for the gathering specifically of

foreign intelligence information, not any information that DOD decides to collect.[vi] FISA's provisions also make clear that probable cause to conduct surveillance or searches of a U.S. person cannot rest solely on that person's activities protected by the First Amendment.[vii] If the reports are accurate, it appears that DOD may have specifically targeted U.S. persons based upon their activities protected by the First Amendment.

DOD's regulations implementing FISA's statutory requirements also underscore the general need for DOD to obtain lawful court orders prior to conducting domestic intelligence activities. DOD's regulations generally require the use of "overt" means of intelligence gathering on U.S. persons, where the subject is advised or otherwise aware that he or she is providing intelligence information to DOD. The use of covert intelligence gathering on U.S. persons is circumscribed to a very narrow set of circumstances, none of which appear to apply here if news reports are correct.[viii] Indeed, DOD's intelligence gathering here appears to have targeted the domestic activities of U.S. persons, for which covert means are impermissible.[ix] DOD's regulations also permit intelligence gathering on U.S. persons only for specific types of information, none of which appear to apply here. In pertinent part, DOD's rules generally permit the collection of non-consensual, non-public information for foreign intelligence or counterintelligence purposes, and for the protection of military facilities.[x] DOD's rules permit non-consensual physical surveillance of U.S. persons within the United States only if the subject has a specified employment or contractual relationship with the military or intelligence services.[xi] Intelligence gathering on peaceful domestic anti-war and counter-military recruitment groups does not appear to fall within any of these categories. Moreover, DOD's data mining of such intelligence information on U.S. persons collected in violation of its rules generally would contravene DOD's rules against retention of such information.[xii]

I ask that you immediately begin an investigation of these alleged violations of the law and report your findings to me by January 31, 2006. In particular, your report should contain the following information:

- (1) What types of information has DOD collected on U.S. persons? What types of information has DOD collected on U.S. persons belonging to domestic anti-war or counter-military recruitment groups?
- (2) What overt methods has DOD employed to collect this information? What non-overt methods has DOD employed to collect this information?
- (3) What types of information on U.S. persons does DOD store as part of its CIFA or TALON programs?
- (4) On how many distinct U.S. persons has DOD collected information? On how many distinct U.S. persons does DOD currently retain information?
- (5) On how many distinct U.S. persons consisting of or belonging to domestic anti-war or counter-military recruitment groups has DOD collected information? On how many such persons does DOD currently retain information?
- (6) For information on U.S. persons retained by DOD, provide a percentage breakdown of the amount of data points collected pursuant to each prong of Procedure 2.3. For information retained by DOD on U.S. persons who belong to domestic anti-war or counter-military recruitment groups, provide a percentage breakdown of the amount of data points collected pursuant to each prong of Procedure 2.3.
- (7) Where non-public information on U.S. persons has been collected without their consent, has DOD in every instance obtained a warrant from a court of lawful jurisdiction? If not, on what legal authority has DOD obtained this information in each instance, and how is this information collection consistent in each instance with DOD 5240 1-R?

Please contact Praveen Goyal of my staff at (202) 225-3072 to coordinate providing your report to me by January 31, 2006, including answers to the specific questions posed above. Thank you for your urgent attention to this serious matter.

Sincerely,

Zoe Lofgren

Member of Congress

[i] "Is the Pentagon Spying on Americans," MSNBC News, Lisa Myers et al., Dec. 14, 2005 (available at <http://msnbc.msn.com/id/10454316/>).

[ii] Id.

[iii] Id.

[iv] Id.

[v] See 50 U.S.C. §§ 1802, 1804; 1822, 1824.

[vi] See id.

[vii] See, e.g., 50 U.S.C. §§ 1804(a)(3)(A); 1824(a)(3)(A).

[viii] See DOD 5240 1-R, "Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons," at Procedure C2.5.

[ix] See id. at Procedure C2.5.1.

[x] See id. at Procedure C2.3.

[xi] See id. at Procedure C9.3.1.

[xii] See id. at Procedure C3.3.